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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JULY 7, 1999

PETITION OF

KENTUCKY UTILITIES COMPANY
d/b/a/ OLD DOMINION POWER COMPANY CASE NO. PUE960303

For injunctive relief and/or
declaratory judgment against
Powell Valley Electric Cooperative

## ORDER ON RECONSIDERATION

On April 19, 1999, Powell Valley Electric Cooperative ("PVEC" or "the Cooperative") filed a petition for reconsideration of the Commission's Final Order of March 31, 1999. We issued an Order Granting Petition for Reconsideration on April 20, 1999, in which we suspended the execution of our Final Order, and permitted Kentucky Utilities ("KU") and the Commission Staff ("Staff") to respond to the issues raised in PVEC's petition and supporting brief. On reconsideration, we reinstate the judgment of our March 31 Final Order.

The Cooperative alleged three errors in our Final Order. PVEC claimed that:

(1) The Commission misconstrued the three-party contract between the Cooperative, Sigmon Coal Company ("Sigmon"), and the Tennessee Valley Authority ("TVA"), and thus erred in not dismissing KU's action for lack of jurisdiction;

(2) The Commission erred in failing to have Sigmon and the TVA made parties to the dispute; and

(3) The Commission erred in failing to address all other defenses raised by PVEC in the case.

Three-party contract and jurisdictional issues

We reject PVEC's assertion that the Final Order mischaracterizes the March 1, 1996, three-party contract among TVA, Sigmon, and the Cooperative, and that it erroneously bifurcates this contract into two separate and independent contracts. We will not respond to the specific claims made by PVEC concerning the three-party contract and associated jurisdictional challenges. We considered the facts and the law regarding this issue, and we confirm our findings and legal conclusions as set forth in the Final Order. The Cooperative does not raise any new arguments in its petition for reconsideration to warrant further discussion or analysis on these issues.

Necessary or indispensable parties

It appears PVEC has likely waived any argument as to necessary or indispensable parties. Moreover, we question the Cooperative's ability to assert claims on behalf of anyone other than itself. Nevertheless, we will address the merits of PVEC's claim that Sigmon and TVA were indispensable parties to this proceeding.

We first note that other jurisdictions that have faced this issue have found that utility customers are not indispensable parties to a proceeding to resolve a service territory dispute among utilities.[1] In Central Illinois Pub. Serv. Co., the appellate court rejected an argument from the losing utility that the commission was without authority to order the customer, Exxon, to act because it was a non-party to the proceeding. The court explained:

> The Commission has the power not only to approve service-area agreements, but to enforce such agreements if a dispute arises. . . . Every decision by the Commission interpreting a service-area agreement necessarily affects customers of electricity. . . . The

[1] See Central Illinois Pub. Serv. Co. v. Illinois Commerce Comm'n, 560 N.E.2d 363, 367 (Ill. App. 1990); In re Petition by Florida Power & Light Co. for Enforcement of Order 4285, 1997 WL 244362 (Fla. Pub. Serv. Comm'n 1997).

> Commission's order does not require Exxon either to act or to refrain from acting; instead it merely requires Exxon to allow the utilities to connect their tie lines in accordance with the Commission's directives.[2]

In the Florida Power & Light case, the Florida Commission rejected a motion to dismiss for failure to join indispensable parties. The commission stated: "The purpose of this proceeding is to resolve a territorial dispute between two utilities, both parties to this proceeding. Utility customers are not indispensable parties to this proceeding."[3]

As the Illinois court and Florida Commission cogently explained, the resolution of service territory disputes inevitably will affect the utilities' customers, to the extent that the customer is limited to receiving electric service from the provider certificated to serve the territory in which the customer is located. That, however, is precisely the reason for and the point of state territorial law--to set forth an orderly, uniform means of assigning customers to utilities and to provide the certainty that utilities need to fulfill their statutory obligation to serve. Sigmon has no more right to obtain service from a utility other than the utility in whose certificated territory Sigmon is located than any other electric customer in the Commonwealth and therefore can hardly be deemed an "indispensable party." If, in cases involving service territory disputes, the Commission were required to join utility customers as indispensable parties, our task of enforcing state territorial law could be rendered virtually impossible. Moreover, we would point out that our Order of March 21, 1997, establishing this proceeding, invited any interested party to participate and neither Sigmon nor TVA elected to do so.[4]

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[2] 560 N.E.2d at 368.

[3] 1997 WL 244362 at *1.

[4] Sigmon did participate in the proceeding to the extent its general manager, Mr. Dennis Brown, offered testimony on behalf of PVEC.

PVEC's due process arguments in support of its indispensable party claims also are without merit. First, as noted by KU and the Staff in their responses to the petition for reconsideration, the primary authority relied on by the Cooperative, Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978), is generally irrelevant to the matter before us. The holding there was simply that due process protections guaranteed under the Fourteenth Amendment require notice and an opportunity for "some kind of hearing" before a municipal utility may terminate a customer's electric service for nonpayment.[5]

PVEC claims its contract with Sigmon and TVA affords Sigmon a "constitutionally protected interest in the contract that requires even greater due process than one terminable simply upon nonpayment."[6] The argument fails for several reasons. First and foremost, Sigmon cannot create a constitutionally protected right in a contract with PVEC where the Cooperative never had the underlying legal authority to provide the service that is the subject of the contract. We have duly determined that PVEC cannot sell power to Sigmon for use at its facilities in KU's Virginia service territory. The result is that Sigmon has contracted with a utility that is unable by law to serve it. Thus, a contract for the provision for such illegal service cannot form the basis for any "rights" that would impair our ability to litigate KU's claims and award appropriate relief.

Moreover, there is no constitutional right afforded utility customers, giving rise to due process protections, to receive utility service from a particular supplier,[7] or to receive a particular

[5] 436 U.S. at 18-20.

[6] Petition for Reconsideration at 16. As noted above, we doubt PVEC's standing to advance legal argument on Sigmon's behalf.

[7] See, e.g., Baker Electric Coop., Inc. v. Public Serv. Comm'n, 451 N.W.2d 95, 104 (N.D. 1990) ("Because 'an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself,' it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a 'consensual relationship' similar to that which occurs in other commercial contexts.") (citing Storey v. Mayo, 217 So.2d 304, 307-308 (Fla. 1968)).

rate for their utility service.[8] Nor can PVEC validly claim that the Commission is without power to supersede a service contract between a utility and its customer in enforcing the Utilities Facilities Act.[9]

The Cooperative's defenses

We also do not find merit in PVEC's claim that we erred in failing to address each defense it raised throughout the proceeding.[10] We are not required to address specifically each claim or defense by each party in our orders, especially, where, as here, the final result makes clear the claims or defenses were rejected. Nevertheless, we state here that we have considered each of the defenses raised by PVEC, including the defenses of laches, waiver, estoppel, unclean hands, and claims under the Rural Electrification Act. Based on our review of the record established in this proceeding, we find that none of these arguments presents a valid defense to KU's petition.

Accordingly, IT IS ORDERED THAT:

(1) The judgment of the Commission's Final Order of March 31, 1999, is reinstated.

(2) PVEC shall transfer service it provides to Sigmon in KU's service territory to KU within 30 days of the issuance of this order; and PVEC and KU shall file a joint report with the Commission certifying that such transfer has occurred within 15 days of such transfer.

[8] See, e.g., Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332, 340-41 (N.D. Ga. 1975) ("[T]hat plaintiffs have an interest in lower electric rates—an interest which they share with all consumers—does not mean that they have a sufficient 'property' interest in lower rates to invoke constitutional due process protection.")

[9] See Commonwealth ex rel. Page Milling Co. v. Shenandoah River Light & Power Corp., 135 Va. 47, 57 (1923) ("[T]he right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State.")

[10] As with the indispensable parties claim, it appears the Cooperative may have waived these claims as well.